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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 275

D. T. CURRIN, S. M. CUTTS, AND H. A. AVERETT, DOING BUSINESS AS FLEMING WAREHOUSE, OXFORD, NORTH CAROLINA, ET AL., *Petitioners,*

vs.

HENRY A. WALLACE, SECRETARY OF AGRICULTURE FOR THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

B. S. ROYSTER, JR.,
J. C. LANIER,
J. W. H. ROBERTS,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	4
Conclusion	6

Citations.

Cases:

Carter v. *Carter*, 56 S. Ct., p. 589	6
Coe v. *Errol*, 116 U. S., p. 517	6
Crescent Oil Co. v. *Mississippi*, 257 U. S., p. 129	6
Federal Compress & Warehouse Co. v. *McLean*, 291 U. S., p. 17	6
Heisler v. *Thomas Colliery Company*, 260 U. S., p. 246	6
Panama Refining Co. v. *Ryan*, 55 S. Ct., p. 241	6
Schechter Case, 295 U. S., p. 495	6
U. S. v. *Butler*, 56 S. Ct., p. 15	6

Statute:

Act of Congress, August 23, 1935, known as Tobacco Inspection Act (Public, 314, 74th Congress, H. R. 8026)	2

Page

Panama Refining Co. v. *Ryan*, 55 Sup. Ct. 241 27
Pennsylvania v. *West Virginia*, 262 U. S. 563 10
Pierce v. *Society of Sisters*, 268 U. S. 510 10
Royal Farms Dairy v. *Wallace*, 7 Fed. Sup. 565 11
Schechter Case, 295 U. S. 495 14
Stafford v. *Wallace*, 258 U. S. 495 8
Terrace v. *Thompson*, 263 U. S. 197 8
Tyson & Bros. v. *Banton*, 273 U. S. 418 8
United States v. *Butler*, 56 Sup. Ct. 15
United States v. *E. C. Knight Co.*, 156 U. S. 1 13
United States Leather Workers v. *Herkert* 265 U. S. 437 13
United States Mine Workers of America v. *Coronado Co.*, 259 U. S. 344 13
Utah Power & Light Co. v. *Pfost*, 285 U. S. 165 19
Westmore Land Coal Co. v. *Rothensies et al.*, 13 Fed. Sup. 321 11

Statutes:

Federal Declaratory Judgment Act, 28 U. S. C. A. 400, Approved June 14, 1934 7
The Tobacco Inspection Act, Approved August 23, 1935 2

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D. T. CURRIN, S. M. CUTTS, AND H. A. AVERETT, DOING BUSINESS AS FLEMING WAREHOUSE, OXFORD, NORTH CAROLINA; H. L. THOMASSON, T. B. WILLIAMS AND J. C. ADCOCK, DOING BUSINESS AS MANGUM WAREHOUSE, OXFORD, NORTH CAROLINA; C. R. WATKINS AND J. R. WATKINS, DOING BUSINESS AS THE JOHNSON WAREHOUSE, OXFORD, NORTH CAROLINA, AND D. F. CURRIN, DOING BUSINESS AS FARMERS WAREHOUSE, OXFORD, NORTH CAROLINA,

Petitioners,

vs.

HENRY A. WALLACE, SECRETARY OF AGRICULTURE FOR THE UNITED STATES, AND J. O. CARR, UNITED STATES DISTRICT ATTORNEY FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AND W. R. WILSON, AGENT AND REPRESENTATIVE OF THE SECRETARY OF AGRICULTURE FOR THE UNITED STATES AND IN CHARGE OF THE GRADING OF TOBACCO UPON THE OXFORD TOBACCO MARKET.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioners, D. T. Currin, S. M. Cutts, and H. A. Averett, doing business as Fleming Warehouse, Oxford,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 275

D. T. CURRIN, S. M. CUTTS AND H. A. AVERETT, Doing Business as Fleming Warehouse, Oxford, North Carolina; H. L. THOMASSON, T. B. WILLIAMS AND J. C. ADCOCK, Doing Business as the Mangum Warehouse, Oxford, North Carolina; C. R. WATKINS AND J. R. WATKINS, Doing Business as the Johnson Warehouse, Oxford, North Carolina, and D. F. CURRIN, Doing Business as Farmers Warehouse, Oxford, North Carolina, *Petitioners*,

vs.

HENRY A. WALLACE, Secretary of Agriculture for the United States, and J. O. CARR, United States District Attorney for the Eastern District of North Carolina, and W. R. WILSON, Agent and Representative of the Secretary of Agriculture for the United States and in Charge of the Grading of Tobacco Upon the Oxford Tobacco Market.

PETITIONERS' BRIEF.

Opinions Below.

The opinion of the District Court of the United States for the Eastern District of North Carolina, which is not

North Carolina; H. A. Thomasson, T. B. Williams and J. C. Adcock, doing business as Mangum Warehouse, Oxford, North Carolina; C. R. Watkins and J. R. Watkins, doing business as the Johnson Warehouse, Oxford, North Carolina; and D. R. Currin, doing business as Farmers Warehouse, Oxford, North Carolina, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above case on April 5, 1938, reversing the judgment of the District Court of the United States for the Eastern District of North Carolina.

Opinions Below.

The opinion of the District Court, which is not reported, appears in the record at pp. 34-43. The opinion of the Circuit Court of Appeals appears in the record at pp. 383-401, and is reported in 95 Fed. (2d), page 856.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 5, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

A. Whether the Act of Congress, approved August 23, 1935, known as the Tobacco Inspection Act (Public, No. 314, 74th Congress, H. R. 8026), is a constitutional and valid exercise of the power of Congress to regulate interstate commerce, or an unconstitutional and invalid attempt to regulate a purely intrastate activity?

B. Whether or not the aforesaid Act of Congress is unconstitutional in substance and materially discriminating in its application?

C. Whether or not said Act of Congress contemplates and provides for an unlawful and unconstitutional delegation by Congress of its legislative powers?

D. Whether or not said Act of Congress violates the Fifth Amendment to the Constitution of the United States?

Statute Involved.

The statute involved is set out in the record at page 18.

Statement.

Your petitioners instituted this suit on October 24, 1936, in the District Court of the United States for the Eastern District of North Carolina for the purpose of having the Tobacco Inspection Act declared invalid.

On October 24, 1936, Judge I. M. Meekins of the District Court of the United States for the Eastern District of North Carolina issued an order to show cause why a restraining order should not issue until the final determination of this action.

The hearing upon the order to show cause was held before Meekins, Judge, on November 5, 1936, at which hearing both the complainants and defendants were represented. At the conclusion of this hearing the court announced from the bench "The Act is unconstitutional; discriminating in its provisions and confiscatory in its application." The restraining order sought by the complainants was thereafter granted. The defendants did not appeal, but elected to answer and have the cause heard upon its merits. At a special term of the United States District Court for the Eastern District of North Carolina, held at Elizabeth City, North Carolina, beginning February 15, 1937, this cause was heard upon its merits, the complainants and defendants both appearing and being represented by counsel. On April 19, 1937, Meekins, Judge, rendered judgment, adjudging and

declaring the Tobacco Inspection Act unconstitutional and invalid.

The defendants appealed to the United States Circuit Court of Appeals.

The cause was heard in the Circuit Court of Appeals for the Fourth Circuit in the January Term, 1938.

On April 5, 1938, the Circuit Court rendered judgment, reversing the judgment of the District Court, and remanding the cause to the District Court with directions to dismiss the bill in accordance with the opinion of the Circuit Court.

Specification of Errors to be Urged.

Your petitioners are advised and believe that the Circuit Court of Appeals erred:

1. In holding that the Act is a valid exercise of the regulatory power of Congress under the commerce clause of the Constitution.

2. In holding that the Act is not unconstitutional in substance and materially discriminating in its application.

3. In holding that the powers granted to the Secretary of Agriculture do not constitute an unconstitutional delegation of legislative power.

4. In holding that the Act does not violate the Fifth Amendment of the Constitution.

Reasons for Granting the Writ.

(1) Briefly stated, the instant case involves the constitutionality of an Act of Congress (R. 18-21) known as the Tobacco Inspection Act. The Act provides that the Secretary of Agriculture is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce. It further provides that before any market

is so designated by the Secretary, a referendum shall be held among the tobacco growers who sold tobacco at auction on such market during the preceding season and that no market or group of markets shall be so designated by the Secretary unless two-thirds of the growers voting favor it.

After an auction market has been so designated by the Secretary, no tobacco can be offered for sale at auction on such market unless and until it has been inspected and certified by a grader or inspector selected by or through the Secretary of Agriculture of the United States. Stated simply, the Act compels all tobacco growers patronizing those markets designated by the Secretary of Agriculture to submit their tobacco to one of said graders or inspectors for inspection and certification before such tobacco can be offered for sale at auction. If sold otherwise than at auction, inspection is not required. The Act further provides a penalty consisting of a fine or imprisonment, or both, for a violation of the provisions of the Act requiring inspection and certification.

The Act does not provide for the inspection of all tobacco moving into interstate commerce. Tobacco sold otherwise than through the auction system or on markets not designated by the Secretary of Agriculture may move freely in interstate commerce without regulation or inspection.

Your petitioners contend that under the decisions of this Court, agriculture and farming is a purely local activity, intrastate in character and not subject to regulation by the Congress. Petitioners further contend that the offering for sale of a farm product by a grower at auction on a warehouse floor does not constitute interstate commerce, and that, prior to its sale or delivery for shipment, Congress has no power to regulate the handling of a farm product; and that the Tobacco Inspection Act, which compels the delivery of a farm product to a government grader for in-

spection, prior to the offering of such farm product for sale or delivery for shipment, and while still in the hands, and under the control, of the grower is clearly beyond the constitutional power vested in Congress, and is an invasion of the powers reserved to the States.

U. S. v. *Butler*, 56 S. Ct., p. 15;
Coe v. *Errol*, 116 U. S., p. 517;
Crescent Oil Company v. *Mississippi*, 257 U. S., p. 129;
Federal Compress and Warehouse Co. v. *McLean*, 291 U. S., p. 17;
Heisler v. *Thomas Colliery Company*, 260 U. S., p. 246.

Your petitioners further contend that the powers granted to the Secretary of Agriculture to designate markets where tobacco bought and sold thereon at auction moves in commerce, is an unconstitutional delegation of legislative power.

The Schechter Case, 295 U. S., p. 495;
Panama Refining Company v. *Ryan*, 55 S. Ct., p. 241.

Your petitioners further contend that the Act violates the Fifth Amendment of the Constitution in that it delegates to a majority the power to pass compulsory legislation affecting the minority, and in that it is discriminatory in its provisions and confiscatory in its application.

Carter v. *Carter*, 56 S. Ct., p. 589.

Conclusion.

The decision below is the first decision under this statute, and is contrary to former decisions of the Court defining the interstate status of agricultural products. The question involved is vital from the standpoint of tobacco warehousemen who have a large investment in the auction system of handling and selling tobacco, and who handle annually a volume of business worth approximately three hundred mil-

lion dollars. The Act in question circumscribes the auction system of selling tobacco, while other methods and systems of selling tobacco are unregulated and free from the compulsory inspection required of auction sales under the Act.

Your petitioners verily believe that this Act is calculated to hinder and destroy their business, in that it places upon the business of your petitioners restrictions and limitations which are not placed upon the business of their competitors, operating the same kind of business, in the same State, and sometimes in the same County. It denies to your petitioners the same rights and privileges enjoyed by their competitors on other auction markets, and by competitors who do not use the auction system.

WHEREFORE your petitioners pray that a writ of certiorari may issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding the said court to certify and send to this Court on a day certain to be therein designated, a certified transcript of the record, that the said case may be reviewed and determined, or that your petitioners may have such other relief as the Court may deem appropriate, and that the said judgment may be reversed.

Respectfully submitted,

B. S. ROYSTER, JR.,
J. C. LANIER,
J. W. H. ROBERTS,
Of Counsel for Petitioners.

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HENRY A. WALLACE, SECRETARY OF AGRICULTURE FOR THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONERS' BRIEF.

B. S. ROYSTER, JR.,
J. C. LANIER,
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INDEX.

Subject Index.

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	2
Specification of errors to be urged	7
Argument	7
Conclusion	31

Citations.

Cases:

Ætna Life Insurance Co. v. *Haworth*, 300 U. S. 227	8
Arkadelphia Company v. *St. Louis, S. W. R. Co.*, 249 U. S. 134	14
Ashwander v. *Tennessee Valley*, 297 U. S. 288	7
Burco, Inc., v. *Whitworth*, 81 F. (2d) 721	18
Carter v. *Carter*, 56 S. Ct. 859	7
Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 210	13
Chassanoil v. *City of Greenwood*, 291 U. S. 584	16
Coe v. *Erroll*, 116 U. S. 517	14, 20
Crescent Oil Co. v. *Mississippi*, 257 U. S. 129	16
Ex parte Young, 209 U. S. 146	8
Federal Compress & Warehouse Co. v. *McLean*, 291 U. S. 17	16
Hammer v. *Dagenhart*, 247 U. S. 251	13
Hart Coal Corp. v. *Sparks*, 7 Fed. Sup. 16	22
Heisler v. *Thomas Colliery Co.*, 260 U. S. 246	13
Hope Gas Co. v. *Hall*, 274 U. S. 284	13
Iowa Southern Utilities Co. v. *Town of Lamoni*, 11 Fed. Sup. 181	11
Kidd v. *Pearson*, 128 U. S. 1	13
McCluskey v. *Marysville & Northern Ry. Co.*, 243 U. S. 579	24
Oliver Mining Co. v. *Lord*, 262 U. S. 172	13

reported, appears in the record at pp. 95-110. In this opinion the court held the Tobacco Inspection Act to be invalid and unconstitutional. The opinion of the United States Circuit Court of Appeals, Fourth Circuit, appears in the record at pp. 384-401, and is reported in 95 F. (2d), page 856. The Circuit Court of Appeals reversed the judgment of the District Court and declared the Act to be valid and constitutional.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 5, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statute Involved.

The statute involved is the "Tobacco Inspection Act" approved August 23, 1935, and is set out in the record at page 19.

Questions Presented.

A. Whether, under the facts in this case, the complainants are entitled to maintain this suit?

B. Whether the Tobacco Inspection Act is constitutional?

Statement.

This action was instituted for the purpose of having an Act of Congress, approved August 23, 1935, known as the Tobacco Inspection Act, declared invalid, and to secure a permanent injunction against the enforcement of its provisions. The complainants operate in the town of Oxford, North Carolina, four (4) auction tobacco warehouses, which are used in connection with the sale of leaf tobacco at auction. In the conduct of their business the complainants furnish the building, the clerical help, labor, equipment and

auction services to tobacco growers who bring their tobacco to the warehouses to be displayed and offered for sale to the highest bidder at auction. For their services the warehousemen received a stated commission, controlled by statute, which is paid by the seller. The purchasers at the auction sales are the various tobacco companies who handle, redry, re-sell and sometimes manufacture tobacco into finished products.

The complainants have large sums of money invested in their warehouses and their equipment, and earn their living thru the operation of such warehouses.

There are seven (7) tobacco warehouses in the town of Oxford, North Carolina, all performing the same services for the growers in connection with auction sales. There are approximately forty (40) tobacco markets in towns in North Carolina where tobacco is sold at auction in warehouses similar in every respect to the warehouses of the complainants.

Pursuant to the power purported to be contained in the Tobacco Inspection Act, the Secretary of Agriculture in 1936 conducted a referendum among the alleged patrons of the Oxford tobacco market. Approximately ten thousand (10,000) ballots were distributed; eighteen hundred ninety-six (1896) were returned; seventeen hundred eighty-two (1782) of these ballots were favorable and one hundred fourteen (114) were unfavorable. The Secretary of Agriculture thereupon designated the Oxford tobacco market as a market where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom moves in commerce, and placed on all the warehouse floors in Oxford government inspectors to grade and inspect all tobacco placed upon said warehouse floors, prior to its being offered for sale at auction on such floors. None of the warehousemen were afforded an opportunity to participate in the

referendum, although the law directly controls the warehousemen in the operation of their warehouse business.

The law does not purport to require grading and inspection of tobacco offered for sale except when such tobacco is to be sold at auction on warehouse floors.

During the selling season of 1936-37 there was compulsory grading and inspection of tobacco on only three (3) markets in North Carolina, namely Farmville, Goldsboro and Oxford; there are forty (40) auction markets in North Carolina, each in competition with the other, operating in substantially the same manner, and handling the same product in the same way.

A referendum was held among the growers alleged to be patrons of the Smithfield, N. C., market but was voted down and Smithfield was not designated as a market on which tobacco bought and sold at auction moves in commerce, though tobacco is sold in the same manner and for the same purpose in Smithfield and Oxford.

The record discloses that there is an admission on the part of the defendants that an actual controversy exists between the complainants and the defendants (paragraph three of the answer). The record further discloses that a number of growers who patronized the warehouses of the complainants objected to compulsory grading and inspection as provided by the Act, and because of said inspection and grading did not sell all their tobacco with the complainants during the season 1936-37.

The record further shows that tobacco sold on the warehouse floors of complainants, ungraded and uninspected, averaged $2.69 per hundred more than tobacco sold during the same period on warehouse floors in Oxford where such tobacco was inspected and graded. This is the record after injunctive relief was granted. If this increase in price was caused by the fact that such tobacco sold by the complainants was not graded or inspected, patrons of complainants

would have received $136,098.00 less for 5,059,430 pounds sold by complainants during this period. Therefore, the commissions of these complainants would have been $3,402.00 less, had not a restraining order been issued which prevented grading and inspection on their floors during this period.

The record further discloses that the producer does not part with title to his tobacco until such tobacco has been sold at auction and the sale approved by the grower, and that under the said Act the inspection and grading required under the Act is done prior to the sale and prior to the offering for sale of the tobacco on the warehouse floor.

Stripped of its legal phraseology, declarations of policy, definition of commerce and directive paragraphs, the Act in essence provides: that no person may offer for sale tobacco *at auction* on a market designated by the Secretary of Agriculture pursuant to Section V of the Act, unless and until such tobacco has been submitted to a government inspector for inspecting and grading. It further provides (Section 12) that any person violating any provision of Sections 5 and 10 of the Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned. The Act therefore is a penal statute.

It does not provide for a general inspection and certification of tobacco moving in interstate commerce. In certain instances it applies to all tobacco offered at auction on a particular market, regardless of whether the tobacco is destined to enter the channel of interstate commerce. In other cases, tobacco of the same character and kind may be sold and shipped in interstate commerce without the inspection or certification provided under the Act. The Act applies only to tobacco sold on particular markets and in a particular manner, to wit at auction. Under the provisions of the Act it is entirely possible for a tobacco grower to sell

and ship in interstate commerce his entire crop, without inspection or certification.

There is no requirement under the Act that tobacco *as such* must be inspected and certified, prior to its shipment in interstate commerce. The provisions of the Act apply *only* when tobacco is sold *at auction* on *designated* markets. Under the Act it is now unlawful to offer for sale tobacco at auction on the markets of Farmville, Goldsboro and Oxford unless such tobacco has been inspected and certified, but *the same tobacco* can be offered for sale *legally* on any one of the other thirty-seven (37) auction markets in North Carolina without inspection and certification. It can be offered for sale, sold and shipped in interstate commerce from Farmville, Goldsboro and Oxford without inspection, provided that it is sold otherwise than at auction.

A producer may sell his tobacco where he chooses, regardless of the fact that he was allowed to vote in the Oxford referendum, under the qualification that he had sold tobacco on the Oxford market. Therefore, under the Act, a grower who voted in the referendum requiring grading on the Oxford market for auction sales may legally and lawfully offer for sale and sell his tobacco ungraded and uninspected on other tobacco markets a short distance from Oxford. He may also sell his tobacco in Oxford ungraded, and may ship it from Oxford uncertified and uninspected, provided only he does not sell it at auction.

Under the provisions of the Act a producer may sell his tobacco in Oxford on the street, or at the receiving plant of a buyer, or he may ship it in interstate commerce to another state, without inspection and certification, but it is a violation of the criminal law under the Act for such grower to offer the same tobacco for sale at auction without having it inspected as required under the Act. Also, he may sell it at auction in an identical manner on various markets adjacent to Oxford and with various warehouse-

men in competition with these complainants, without the necessity of having it graded and inspected by government graders.

The District Court held the Tobacco Inspection Act to be invalid, and granted a permanent restraining order. Upon appeal to the Circuit Court of Appeals, the judgment of the District Court was reversed. The appeal reached this Court under a writ of certiorari.

Specification of Errors to be Urged.

That the Circuit Court of Appeals erred:

1. In holding that the Act is a valid exercise of the regulatory power of Congress under the commerce clause of the Constitution.

2. In holding that the Act is not unconstitutional in substance and materially discriminating in its application.

3. In holding that the powers granted to the Secretary of Agriculture do not constitute an unconstitutional delegation of legislative power.

4. In holding that the Act does not violate the Fifth Amendment of the Constitution.

ARGUMENT.

Complainants Are Entitled to Maintain This Suit.

Complainants contend that they are entitled to maintain this action to test the constitutionality of this Act.

Ashwander v. *Tennessee Valley*, 297 U. S. 288;
Carter v. *Carter*, 56 S. Ct. 859.

The Federal Declaratory Judgment Act (28 U. S. C. A. 400), approved June 14, 1934, provides:

> "In cases of actual controversy the courts of the United States shall have power, upon petition, declara-

tion, complaint or other appropriate pleadings, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the full force and effect of a final judgment or decree, and be reviewable as such."

Complainants contend, and have set out in their pleadings, that there is a "case" or "controversy" between the complainants and the defendants within the meaning of those terms in the Constitution (Article 111, Section 2); that it is an "actual controversy" within the meaning of the terms of the Federal Declaratory Judgment Act. Respondents admit that an actual controversy exists. We contend that we have a right to question the constitutionality of the Act, and if the Act is unconstitutional, we have a right to operate our business without complying with the Act. Such a course would be ruinous to us in the event the Act is held to be valid. The penalties imposed for violations are severe and cumulative, and our rights would be irreparably damaged.

Ex parte Young, 209 U. S. 146;
Stafford v. *Wallace*, 258 U. S. 495-512;
Terrace v. *Thompson*, 263 U. S. 197-215;
Tyson & Bros. v. *Banton*, 273 U. S. 418-428.

If the Act is unconstitutional, we contend that we ought not be required to comply with it; and that, pending the Court's decision, we ought not be required to jeopardize our property and liberty by violating its provisions.

Also, we contend that there is an actual controversy between the parties as contemplated in the Declaratory Judgment Act.

Ætna Life Insurance Company v. *Haworth*, 300 U. S. 227.

The evidence discloses that complainants have large sums of money invested in auction warehouse property; that a number of their patrons are opposed to compulsory grading and inspection, and did not patronize these complainants because they disliked this service; that compulsory grading and inspection added considerable costs to these complainants in the operation of their business; that tobacco sold on the warehouse floors in Oxford where compulsory grading was enforced brought $2.69 per hundred less than tobacco sold during the same period on the same market in warehouses where no such inspection was enforced; that this difference in price would have cost complainants in commissions more than $3,000.00, had compulsory grading been enforced on their floors, with prices comparable to prices on other warehouse floors where grading was enforced.

The record further discloses that ungraded tobacco sold on the Oxford market in 1935-36 brought higher average price than tobacco sold on the Henderson and Durham markets during the same period, but that in 1936-37, when a large portion of the tobacco sold in Oxford was graded under the Act, the average price on the Durham and Henderson markets exceeded the average on the Oxford market. The Henderson and Durham markets are competitive markets to the Oxford market, located in the same tobacco belt, within a few miles of the Oxford market, and selling the same type of tobacco, from the same area, and in the same manner.

It is apparent therefore that at the time of the institution of this action the complainants were sustaining losses and injuries for which there was no adequate or complete remedy at law. The Act imposed penalties so severe and cumulative as to deter complainants from violating its provisions. On the other hand, compliance with its terms subjected the complainants to irreparable damage. In such

cases a court of equity has jurisdiction to enjoin the prosecution of criminal proceedings.

The general rule is that a court of equity has no such jurisdiction, but there is a well-recognized exception to this general rule.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 563, the Court says:

> "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the Court says:

> "The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of the courts of equity."

In this case the complainants were placed in the dilemma of either violating the statute and thereby running the risk of suffering severe cumulative penalties, or of complying with the statute and thus suffering irreparable property damage without being afforded an opportunity to determine the constitutionality of the Act.

We allege that the Act is unconstitutional; but if we violate it we are liable to a penalty of $1,000.00 fine and 12 months in jail for each violation. If we are unwilling to incur this jeopardy, our profits will disappear, our goodwill as tobacco warehousemen will vanish, and our customers who dislike government grading will market their crop on other markets where grading is not compulsory. For these losses there is no adequate or complete remedy at law.

Therefore, under the facts and allegations, complainants contend that they are entitled to injunctive relief.

In *Royal Farms Dairy* v. *Wallace*, 7 Fed. Sup. 565, the Court says:

> "We are not dealing here with a case where the law on its face is clearly applicable to one who complains that the act is unconstitutional, and where the complainant is subjected to heavy penalties if he unsuccessfully risks the assumption of its unconstitutionality. In such cases the jurisdiction of equity to enjoin defendants in the enforcement of an invalid law at the request of the complainant is well established."

The Court further says in the same opinion:

> "Nor are we dealing with a case where the injunction is asked against an officer who clearly has power to enforce the law if valid."

In the instant case the District Attorney clearly has the power to enforce this law, if valid. To subject complainants to a multiplicity of criminal actions, pending final determination of the validity of the Act, would work a cruel hardship upon them, and in effect deprive them of their rights guaranteed under the Constitution.

Westmoreland Coal Co. v. *Rothensies et al.*, 13 Fed. Sup. 321;

Iowa Southern Utilities Co. v. *Town of Lamoni*, 11 Fed. Sup. 181.

Complainants respectfully contend that they have a right to maintain this suit in a court of equity, and that they are entitled to a permanent restraining order, under all the facts.

But beyond the question of injunctive relief is the vital question of the constitutionality of the Tobacco Inspection Act. Complainants contend that the Act is unconstitutional and invalid, for that:

1st. The Act is not a valid exercise of the regulatory power of Congress under the commerce clause of the Constitution.

2nd. The Act is unconstitutional in substance and materially discriminating in its application.

3rd. That the Act contains an unconstitutional delegation of legislative power to the Secretary of Agriculture.

4th. That the Act violates the 5th amendment of the Constitution.

The Transaction of Offering for Sale Tobaccco at Auction on Warehouse Floors is not a Transaction in Interstate Commerce.

Complainants contend that the business of offering for sale tobacco at auction upon their warehouse floors, as agents for the growers, who haul tobacco from their farms to the warehouse, is not a transaction in interstate commerce, nor does it affect interstate commerce, nor does it burden interstate commerce, within the meaning of the commerce clause of the Constitution.

We think this conclusion is inescapable, in the light of recent decisions of the Supreme Court.

Tobacco is not inherently an interstate commodity. There is a wealth of authority that cotton is not inherently an interstate commodity. The grower's cotton at the gin or in a storage house or in a local bonded warehouse has been held to be intra-state in character. Only when it begins to move in interstate commerce, does it take on an interstate character. The movement of cotton from the fields to the gin, from the gin to storage and from storage to market has always been held to be intra-state in character. And so with tobacco.

The title and control of the grower's tobacco does not pass from the grower unless and until he accepts the price

offered at the auction sale. The auction transaction is not a sale and passes no title. Only when the grower accepts the offered price is the sale consummated and title passed. After the tobacco has gone thru the auction sale the farmer may, and often does, reject the offered price and remove his tobacco from the warehouse floor and take it back home to await a more favorable price.

We contend that tobacco becomes interstate in character only when the sale is consummated and possession passes from the grower to purchaser. We contend that tobacco, moving from the fields to the curing barns, and from the curing barns to the warehouse floors, is no part of interstate commerce until sale and delivery have been made to a purchaser. *It should be noted that the inspection is required prior to the offering for sale of tobacco by a grower.* We contend that the right of control of commodities such as tobacco, cotton and coal, up to the point of sale, is not delegated to the Federal Government, but expressly reserved to the States by the 10th Amendment.

In the case of *United Mine Workers of America* v. *Coronado Company,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 246; and *Oliver Mining Co.* v. *Lord,* 262 U. S. 172, it was held that the mining of coal is not interstate commerce, regardless of the fact that the coal may be entirely or largely transported in interstate commerce soon after the mining operations are completed.

In *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, and *Hope Gas Co.* v. *Hall,* 274 U. S. 284, it is held that the production of oil is not interstate commerce, though the oil is intended to be, and actually is thereafter transported to other states. In *Hammer* v. *Dagenhart,* 247 U. S. 251; *United Leathers Workers* v. *Herkert,* 265 U. S. 457; *United States* v. *E. C. Knight Co.,* 156 U. S. 1; and *Kidd* v. *Pearson,* 128 U. S. 1, the Court holds that the manufacture of goods intended to be transported and subse-

quently shipped in interstate commerce is not interstate commerce.

The cutting of timber, for immediate transportation to other states, is not interstate commerce.

Coe v. *Errol*, 116 U. S. 517.

In *Carter* v. *Carter Coal Company* (*supra*), the Court makes the distinction between the *Swift Stockyards* case and cases similar to the case at bar. Citing *Arkadelphia Company* v. *St. Louis S. W. R. Company*, 249 U. S. 134, The Court says:

> "One of the questions considered was whether certain shipments of roof material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the state, was a continuous movement in interstate commerce. It appeared that when the roof material reached the mills it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About ninety-five per cent of the finished articles was made for outbound shipment. When the roof material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the state. And all of them knew and intended that this ninety-five per cent of the finished product would be so sold and shipped. This Court held that the state order would not interfere with interstate commerce, and that the Swift case was not in point."

The Supreme Court also held that the *Swift* case was not in point in respect to the mining and shipment of coal. The Court says:

> "The restricted field covered by the Swift and kindred cases is illustrated by the Schechter case (295 U. S. 495). There the commodity in question, although

shipped from another state, had come to rest in the state of its destination, and, as the Court pointed out, was no longer in a current or flow of interstate commerce. The Swift doctrine was rejected as inapposite. In the Schechter case the flow had ceased. Here it had not begun. The difference is not one of substance."

We contend that tobacco grown, handled and carried to market by a North Carolina grower, in the State of North Carolina, and there offered for sale, has not entered the flow of interstate commerce. The mere offering for sale of such tobacco upon a warehouse floor at auction in Oxford has no effect or influence upon interstate commerce nor does it burden commerce. It may never enter into interstate commerce. The grower may reject the sale and carry the tobacco back to his farm. It may be consumed locally. It may move to Durham, North Carolina, for storage or manufacture. It may be transferred to a redrying plant at Reidsville, N. C. There is no basis for an assumption that it will enter into the current of interstate commerce. The producer has no interest in its ultimate destination. The warehouseman has no control over its movement after it has been sold and moved by the buyer.

In *U. S.* v. *Butler*, 56 S. Ct., the Court says:

"The third clause (of the Constitution) endows the Congress with the power to regulate commerce among the several states. Despite a reference in its first section to a burden on, and an obstruction of, the normal current of commerce, the Act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer."

The Court says further:

"The Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricul-

tural production, a matter beyond the powers delegated to the Federal Government."

The courts have consistently denied to the Congress the power to regulate transactions not interstate in character. They have denied to the Congress the power to regulate the production of agricultural products.

The Tobacco Inspection Act states as its purpose the raising of prices to tobacco growers. If Congress could legislate for this purpose under the commerce clause, then certainly it could regulate production of agricultural commodities as a proven means of bringing about this desired result. But the Supreme Court has ruled against such regulation, however good its purpose and however successful its application.

If offering for sale tobacco constitutes interstate commerce, then the hauling of tobacco on the county roads by a North Carolina tobacco farmer is interstate commerce. The movement of the tobacco from the fields to the barns and to the packhouses would be interstate commerce; and, in fact, every movement of the tobacco from the transplanting of the plants to the field would become a part of interstate commerce. The contention of the complainants is that the movement does not partake of an interstate character until it has been sold and delivered to a purchaser, and actually has begun its journey in interstate commerce, or has been consigned to a carrier.

The ginning of cotton, although the cotton is to be immediately transported into interstate commerce, and although the cotton has already begun its journey from the fields to the market, is not interstate commerce.

Crescent Oil Co. v. *Mississippi*, 257 U. S. 129;

Federal Compress & Warehouse Co. v. *McLean*, 291 U. S. 17;

Chassanoil v. *City of Greenwood*, 291 U. S. 584.

In the case of *Federal Compress & Warehouse Co.* v. *McLean* (*supra*), it was contended that cotton produced locally, shipped into a warehouse and there held at the exclusive disposition of its owners—the holders of negotiable warehouse receipts—retains its local status, although in the usual course the owners will ultimately order that it be compressed and delivered to a rail carrier for shipment to ultra State destination of their selection. This contention was sustained. The Court said:

> "The business of storing and compressing the cotton, in such circumstances, is local, and a non-discriminatory state tax upon it is consistent with the Commerce Clause of the Constitution."

The case of *Crescent Oil Co.* v. *Mississippi* (*supra*), is directly in point. In this case a Tennessee corporation, finding it impracticable to successfully conduct its business without acquiring and operating gins in Mississippi and other States, purchased in those States from cotton growers the seed from the cotton ginned by them for the growers and then shipped the seed to its Tennessee factory. The Court says:

> "Since the ginning was merely manufacturing, and the seeds were not in interstate commerce until purchased and committed to a carrier, the gins were not instrumentalities of interstate commerce, and prohibition of their operation did not infringe the Company's rights under the Commerce Clause."

The Court further says in this case:

> "When the ginning is completed the operator of the gin is free to purchase the seed or not, and if it is purchased to store it in Mississippi indefinitely, or to sell or use it in that state or to ship it out of the state for use in another, and, under the cases cited, it is only in this last case and after the seed has been committed

to a carrier for interstate transport that it passes from the regulatory power of the state into interstate commerce and under the national power."

In the very recent case of *Burco, Inc.*, v. *Whitworth*, 81 F. (2d) 721, Judge Soper used the following very pertinent language:

"The objection to the Public Utility Act is similar to that which proved fatal to the first child labor statute passed by Congress and considered by the Supreme Court in Hammer *v.* Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724. The statute was held unconstitutional on the broad ground that it was an attempt to regulate the internal affairs of the states. The court considered the rulings above cited and showed that they rested upon the exceptional character of the subjects of commerce dealt with, which justified the decision of Congress to exclude them from the channels of interstate trade. This element was held to be absent in the case before the court since the goods were themselves harmless, and the real thing intended to be accomplished by the statute was the denial of the facilities of interstate commerce to manufacturers who employed children within the prohibited ages. It was held that the grant of power to Congress to regulate interstate commerce does not authorize it to control the states in the exercise of their police power over local trade or manufacture.

"This ruling was repeated in the Child Labor Case (Bailey *v.* Drexel Furniture Co.), 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A. L. R. 1432, where the court held that a so-called excise tax of 10 per cent of the net profits of businesses employing child labor was not in reality a tax but a penalty imposed for the regulatory purposes of prohibiting the labor of children in factories. In both of these cases, as in the present case, the Government urged that the legislation should be upheld because the evil aimed at affected the whole Nation; and could not be effectively cured

by the separate action of the several states, but only through an Act of Congress bearing upon all localities alike; but the court pointed out that it is as much its duty to strike down an unconstitutional act designed to achieve a desirable end if it is not within the power of Congress as it is to uphold an act passed in conformity with the Constitution, although the court may not perceive the wisdom of its underlying policy. Otherwise the dividing line between the powers of the national Government and the powers of the states would be obliterated."

The generation of electricity, which is instantly thereafter transmitted across State lines, is not interstate commerce.

Utah Power & Light Co. v. *Pfost*, 285 U. S. 165.

In *Heisler* v. *Thomas Colliery Co.* (*supra*), the Court says:

"The contention is that the products of the state that have, or are destined to have, a market in other states are subjects of interstate commerce, though they have not moved from the place of their production or preparation. The reach and consequences of the contention repel its acceptance. If the possibility, or indeed the certainty, of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from that state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals as they lie in the ground. The result would be curious. It would nationalize all industry, it would nationalize and withdraw from the state jurisdiction and deliver to Federal commercial control the fruits of California and the south, the wheat of the west, and its meats, the cotton of the south, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and

> wheat ungathered, hides and flesh of cattle 'on the hoof', wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production."

We contend that if Congress has the power to compel a person to submit tobacco to Government regulations, prior to its sale and prior to its delivery to the buyer, under the Commerce Clause or the General Welfare Clause of the Constitution, then such power will deliver to Federal control the tobacco yet unplanted and unharvested and unsold, because it is in large percentage destined for and surely to be exported to States other than that of its production.

In *Coe* v. *Errol*, 116 U. S. 517, the Court says:

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to Federal regulation under the Commerce Clause.
>
> "Though intended for exportation, they may never be exported. The owner has the perfect right to change his mind, and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state?"

In the instant case, we contend that the flow of tobacco into interstate commerce had not begun prior to its sale or delivery, and therefore, as the Court says in the *Schechter* case (*supra*), "the want of power on the part of the Federal Government is the same, whether the wages, hours of service and working conditions are related to production before interstate commerce has begun, or to sale and distribution after it has ended".

In the declaration of policy, Section 2 of the Act, it states:

> "That transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; that such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; that the classification of tobacco according to type, grade, and other characteristics *affects the prices received therefor by producers;* that without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; that such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein."

In the *Guffey Coal* decision, *Carter* v. *Carter Coal Company* (*supra*), the Court, commenting upon a similar declaration of policy, says:

> "These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows."

These declarations in the Tobacco Inspection Act constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows. Therefore, they become, in effect, self-serving declarations which add nothing to the validity of the Act; nor do they bring the subject within the range of the powers of Congress to regulate.

Neither can it be contended that the power to legislate for the common defense and general welfare of the United

States granted to Congress the power to enact this Act. It has always been conceded that the phrase "to provide for the general welfare" qualifies the power to lay and collect taxes. If we accept the view that the Congress has the power to legislate in this field because "fluctuations in price and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce", it would be logical also for Congress to legislate if prices and quality determinations occur which are detrimental to buyers. In other words, if this Act is a valid exercise of the legislative power of Congress, then, too, it could legislate with equal validity against high prices received by farmers for their tobacco.

In *Hart Coal Corporation* v. *Sparks,* 7 Fed. Sup. 16, the Court says:

> "He who would find in such cases as Stafford *v.* Wallace, and Chicago Board of Trade *v.* Olsen, authority for the exercise of such power has read the opinions of the Supreme Court on the subject to but little purpose, and fails to comprehend that those cases deal with acts, instrumentalities and agencies directly connected with or affecting interstate commerce, and in no wise involved the regulation of manufacture or production."

In the instant case, the tobacco upon which the Government is attempting to force compulsory inspection and certification has not entered into the flow of interstate commerce. The grower, after having cultivated and harvested his crop, places it in a truck or a wagon and carries it to the Oxford market. There he arranges it neatly in baskets provided by the warehouse for the purpose of displaying the tobacco for sale on the warehouse floor. The baskets of tobacco, after being weighed and identified as to ownership by tickets placed on the top of the baskets, are arranged in rows across the warehouse floor, where each basket is inspected by the buyers at the time of its sale.

The warehouses of these complainants are not "warehouses" within the usual meaning of the word. A tobacco warehouse is not a storage place, but is a market place, where the seller brings his tobacco to be sold, and the buyers go to buy. The warehousemen provide the building in which the tobacco is displayed for sale, and provide the physical equipment and the bookkeeping force necessary and incidental to the sale of tobacco at auction. Each day at a stated time the buyers gather in the warehouse, and each basket of tobacco is offered for sale at auction to the highest bidder. The warehouseman has the custody of the tobacco and offers it for sale as the agent of the grower. *After the auction sale has passed each basket of tobacco, the grower has the privilege of confirming or rejecting the sale, and until he confirms the sale the tobacco belongs to him and is in his actual possession. If the owner confirms the sale, the possession then, but not until then, passes to the buyer.*

Our contention is that prior to its actual sale and delivery, the tobacco has not become a part of interstate commerce, and therefore the Congress has no power to regulate transactions which occur prior to the sale. *The inspection and certification under the Tobacco Inspection Act takes place prior to the sale, and prior to the tobacco having been offered for sale. Therefore, we contend that the Act is invalid for want of power on the part of Congress to enact such legislation.*

In *United States* v. *Butler* (*supra*), this Court declared the Agricultural Adjustment Act unconstitutional, upon the ground that agricultural production was a local activity, and therefore beyond the power of Congress to regulate. It says:

> "The Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricul-

tural production, a matter beyond the powers delegated to the Federal Government."

In the case of *McCluskey* v. *Marysville & Northern Ry. Co.*, 243 U. S. 579, the Court says:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

We contend that the exportation of tobacco, brought to the warehouse by the grower from the surrounding country, and displayed for sale on the warehouse floor, has not begun, prior to its sale and delivery to the buyer by the grower.

The Tobacco Inspection Act is Unconstitutional in Substance and Materially Discriminating in its Application.

Under the provisions of this Act, Federal Inspection of tobacco is required on the Oxford market, while it is not required on other neighboring competitive markets. Under this Act a grower who patronizes the Henderson, N. C., market may sell his tobacco without Federal Inspection, while the grower who patronizes the Oxford, N. C., market violates a penal statute unless his tobacco is inspected by government inspectors prior to its being offered for sale.

As applied to complainants, if they offer for sale tobacco on their warehouse floor without Federal Inspection and grading they commit a crime and lay themselves liable to a fine and imprisonment. Warehousemen on markets other than the Oxford market, engaged in the same business, do-

ing business in the same way, and competing for business among the same growers, can offer the same tobacco for sale in their warehouses without inspection.

The auction warehouse business is highly competitive. Markets and individuals compete for the patronage of the tobacco growers. They operate under the same conditions, handle the same product, and are governed by the same economic laws. Therefore, a statute that imposes restrictions upon one group of warehousemen to the exclusion of another group is discriminatory and confiscatory. Manifestly this discrimination is not passive but active, and calculated to destroy the business of these complainants.

If it be conceded that the power exists under the Constitution to inspect and certify tobacco, the Government must use the power in accord with the principle of equal rights to all and special privileges to none. It must treat equally and alike each of its citizens engaged in a common enterprise. Material discrimination between citizens engaged in the same business can not be justified, however paternal the thought or worthy the purpose. The principle of equal rights is the cornerstone of free government.

To say to the complainants in Oxford, Thou shalt not, and to the warehousemen in Henderson, ten miles away, Thou mayest, violates the principle of equal rights to all.

In substance this Act says to complainants, "You must not offer for sale tobacco on your warehouse floors unless and until it has been inspected by government inspectors", and at the same time it says to warehousemen on 37 other competitive markets, "You may sell on your warehouse floors without inspection."

The Tobacco Inspection Act is not an act to aid the collection of revenue as the Harrison Narcotic Act, which was held constitutional in the *Doremus* case. Nor is it a regulation of interstate commerce, since it does not pretend to con-

trol the movement of tobacco in commerce. It places no restriction upon the movement of tobacco in interstate commerce. The thing sought to be regulated appears to be the auction method of selling tobacco.

Discrimination may mean confiscation, and, as applied in this case, the unreasonable discrimination against the business of the complainants leads to confiscation.

We contend that it is a material discrimination for the Government to exercise control and inspection over complainants' business, without maintaining the same inspection and control over the business of competitors engaged in the same business.

The Act is Invalid Because it Contains an Unconstitutional Delegation of Legislative Power.

Section 5 of the Act provides:

> "That the Secretary is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce. Before any market is designated by the Secretary under this section, he shall determine by referendum the desire of tobacco growers who sold tobacco at auction on such market during the preceding marketing season. The Secretary may at his discretion hold one referendum for two or more markets, or for all markets in a type area. No market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it. The Secretary shall have access to the tobacco records of the Collector of Internal Revenue, and of the several collectors of Internal Revenue, for the purpose of obtaining the names and addresses of growers who sold tobacco on any auction market, and the Secretary shall determine from said records the eligibility of such grower to vote in such referendum."

In the Schechter case the Court says:

> "Congress can not delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

Again the Court says:

> "Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies * * *. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

In *Panama Refining Company* v. *Ryan*, 55 S. Ct. 241, the National Recovery Act was declared invalid, because it attempted to delegate to the President legislative powers without having established a standard or a rule under which the President should act. Article 1, Section 1, of the Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

In the instant case, the Act attempts to delegate to the Secretary of Agriculture the power to designate certain markets where tobacco bought and sold thereon at auction moves in commerce. The very wording of the Act would seem to infer that tobacco sold on markets not so designated by the Secretary does not move in commerce. The Act by a mere verbiage attempts to vest in the Secretary the power to declare a fact, and also the power to legislate concerning that fact. The attempted delegation of this power to the Secretary, whereby tobacco sold at auction on the Oxford markets moves in commerce, while the same tobacco if sold on the Durham market or other North Carolina

markets at auction does not move in commerce, is a fantastic travesty upon the principle of "equal rights to all".

Under this Act, if the Secretary does so designate a market, then it becomes a crime for a person to offer for sale tobacco on such market without its having been certified and inspected, while the same person may offer for sale the same tobacco on another market in the same state without violating the penal provisions of this Act.

If this law has any standing as a penal statute, it is because of the effect of executive action on the part of the Secretary. If he says so, it is unlawful to sell tobacco at auction on a certain market without inspection and certification; if he does not say so, the same act of selling on the same market is lawful. Clearly, this gives to the Secretary an unfettered discretion to designate when a law is a law, and when it is not a law, and to declare the same act as criminal in one place and perfectly legal in another though the difference at most is purely geographical.

Legislation of this character exalts the power of the central government and abridges the fundamental rights of the individual. Under the guise of benevolences and benefits, it invades the privacy of the individual and regiments him against his will. Through the false promise of benefits, it slips the handcuffs on individual liberty and subjugates the rights of the people to the Government. It makes a bureaucracy the master of the people.

The right to life, liberty and the pursuit of happiness is the fundamental right, paramount to and above the right to regiment even for the benefit of the people. All forms of tyranny are odious, it matters not whether it is from despots, dictators or bureaucracies. And the purpose of this Act, which we are now attacking, is to establish a dictatorship or a bureaucracy over the handling and sale of tobacco at auction. Measured by the yardstick of the decision in

the Guffey Coal case, the National Industrial Recovery case and the Agricultural Adjustment Administration case, this Tobacco Inspection Act shouts unconstitutionality from every page. Whether the end sought to be attained by this Act is legitimate is wholly a matter of constitutional power, and not at all of legislative discretion.

The Act is Invalid Because it Violates the Fifth Amendment to the United States Constitution, Which Provides That No Person Shall be Deprived of Life, Liberty or Property Without Due Process of Law.

We contend that the Act is invalid, as a violation of the Due Process Clause, in that it provides for a referendum through which the will of a majority may be imposed upon the minority. It delegates to a majority the power to pass compulsory legislation affecting a minority. In the *Guffey Coal* case (*Carter* v. *Carter Coal Company, supra*), the Court says, regarding the power of a majority to enact compulsory provisions:

> "To accept in these circumstances is not to exercise a choice but to surrender to force. The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or to an official body, presumptively disinterested, but to private persons whose interests may be, and often are, adverse to the interests of others in the same business. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of the rights safeguarded by the Due Process Clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court, which foreclose the question."

We submit that the trumpet tones of this decision foreclose the Tobacco Inspection Act, which confers the power upon a majority to regulate the affairs of an unwilling minority.

Section 5 of the Act provides:

> "No market or group of markets shall be designated by the Secretary unless two-third of the growers voting favor it."

It is, therefore, possible, under the terms of the Act, for a small minority to impose its will upon a majority. For instance, should only ten per cent of the growers who patronize a market vote, then an affirmative vote of six and two-thirds per cent of the growers would impose the provisions of this Act upon such market. In fact, under the provisions of the Act, if only three growers who patronize the Oxford market should vote, an affirmative vote by two of these growers would impose the Act upon the Oxford market. Actually in the referendum, only 1782 growers voted in favor of grading, although 8608 ballots were mailed direct to growers.

The complainants are disqualified from voting under the terms of the Act, although it vitally affects their business and property, and although it imposes duties and expense upon them without remuneration from the Government. Therefore, although they have a real interest in the matter, and although their property rights are most seriously affected by the application of the provisions of this Act to the markets where the property of the complainants is situated, they are at the mercy of a group of growers who vote affirmatively in favor of the Tobacco Inspection Act. Although the power to legislate, under the Constitution, is reserved to the Congress, under the terms of this Act the power to legislate is conferred upon a group of growers who may be a very small minority of the whole class. Thus it can be seen that

this statute undertakes "an intolerable and unconstitutional interference with personal liberty and private property."

And it should be noted that after 1782 growers had voted compulsory grading on complainants floors, these growers are left at liberty to sell their tobacco ungraded on markets where there is no compulsory grading. In other words they put the shackles on the Oxford warehousemen, *who could not vote*, and leave themselves free to roam at will, and to sell their tobacco in any manner they choose, graded or ungraded.

Complainants contend, and by evidence have shown, that the application of the conditions provided for by the Tobacco Inspection Act will work a great hardship upon them in the conduct of their business; that other markets similarly situated which do not have this inspection and certification will have a competitive advantage over these complainants; and that such arbitrary discrimination, obvious on its face, is a violation of the Due Process Clause of the Constitution, and a violation of the personal and property rights of these complainants.

Conclusion.

We have attempted to show the Court that the Court has jurisdiction in the cause of action stated in the bill of complaint; that the complainants are in a position to invoke the aid of a court of equity; and that they are entitled to an injunction against the defendants.

We have also presented our contentions that the Tobacco Inspection Act is unconstitutional and invalid, for that:

(1) The said Act exceeds the powers granted to Congress under the Constitution of the United States, in that the transaction of offering tobacco for sale at auction does not constitute interstate commerce, within the meaning of the Commerce Clause of the Constitution.

(2) That the Act is unconstitutional in substance an materially discriminating in its application.

(3) That the Act contains an unlawful delegation o legislative power to the Secretary of Agriculture.

(4) That the said Act is in violation of the Fifth Amend ment to the Constitution of the United States, which pro vides that no person shall be deprived of life, liberty o property without due process of law.

The first sentence of Section 2 of the Act asserts:

> "That transactions in tobacco involving the sal thereof at auction as commonly conducted at auctio markets are affected with a public interest."

We contend that the power to regulate transactions affecte with a public interest is denied to the Congress by the Co stitution.

The second sentence in Section 2 of the Act asserts:

> "That such transactions are carried on by tobacc producers generally and by persons engaged in the bus ness of buying and selling tobacco in commerce."

We contend that the power to regulate the buying and sellin of tobacco in commerce is denied to the Congress by th Constitution of the United States, *unless* such commerce i interstate commerce or commerce with a foreign nation.

The third sentence of Section 2 of the Act asserts:

> "That the classification of tobacco according to typ grade, and other characteristics affects the prices r ceived therefor by producers."

We contend that Congress is without power under the Co stitution to legislate regarding prices received by produce whether upward or downward.

The fourth sentence of Section 2 of the Act asserts:

"That without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce."

We contend that the Congress has no power to legislate to control fluctuations in prices and quality determinations.

The last sentence of Section 2 of the Act asserts:

"That such fluctuations constitute a burden upon commerce * * *."

We contend that the Congress is without power under the Constitution to regulate such fluctuations.

The Tobacco Inspection Act creates an unjust, inequitable and unfair situation. The complainants have large sums of money invested in Oxford in the warehouse business. They were disqualified from voting in the referendum. The qualified voters, who are the producers selling tobacco on the Oxford market, have no investment in the warehouse business in Oxford, yet seventeen hundred eighty-two (1782) votes out of eighty six hundred eight (8608), who were afforded an opportunity to vote, imposed upon the complainants the necessity of submitting to government inspection all tobacco offered for sale in their warehouses. The voters themselves are not compelled to submit their own tobacco to government inspection. They can sell it on auction markets within ten (10) miles of Oxford, free from inspection, or can sell it in Oxford free of inspection, provided only that it is not offered for sale in the auction warehouses at auction. There is no provision in the Act which compels a single grower who voted for compulsory inspection to submit his tobacco to the required inspection. Under this law the voters may vote conditions and restrictions upon complainants, without such restrictions being mandatory upon

the voters themselves. The old adage that "what is sauce for the goose is sauce for the gander" has no meaning or application under this Act.

The Act is so worded that a warehouseman in Oxford may be guilty of a criminal offense in doing the identical act that can be legitimately done ten (10) miles away. The complainants under this Act will lose their property and their liberty if they offer for sale tobacco without the inspection. Ten (10) miles away on the Henderson market tobacco warehousemen, engaged in the same business, with the same investment, and operating in the same manner, may sell tobacco at auction without let or hindrance.

The only thing standing between these complainants and confiscation of their property and their personal liberty is the protection of the Constitution, based upon the bed rock of "equal rights to all, and special privileges to none".

We contend that the Law is unconstitutional.

Respectfully submitted,

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